STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 6, 2000
v	No. 206959 Recorder's Court
MYRON CHARLES GLENN, Defendant-Appellant.	LC No. 97-500197

Before: Hood, P.J., and Gage and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right from his post jury trial conviction of assault with intent to murder, MCL 750.83; MSA 28.278. The trial court sentenced defendant as a second habitual offender, MCL 769.10; MSA 28.1082, to life imprisonment. We affirm.

I

Defendant first contends that the trial court's several admissions of irrelevant or otherwise improper evidence deprived him of a fair trial. We review the trial court's decision to admit evidence for an abuse of discretion, *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998), which will be found only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997).

A

Defendant, who was charged in this case with the violent stabbing of a cab driver, argues that at several points during presentation of the prosecutor's case witnesses made comments that revealed, with greater detail as the case proceeded, defendant's involvement in another, subsequent attack on a cab driver. Defendant asserts that these revelations violated the trial court's pretrial order that prohibited references to defendant's other crimes. Defendant notes that during defense counsel's cross examination of the victim, the victim stated that "Karen . . . another lady cab driver that was assaulted in a separate incident" also was present at defendant's lineup. The victim also indicated during cross

examination that defendant "has been locked up for a while" and must have "pumped up some" while he was in jail because he had gained weight since the incident.

We note initially that defense counsel did not make a timely objection to these statements, and that therefore defendant's argument is unpreserved. MRE 103(a). Furthermore, the victim's statement concerning Karen did not intimate that defendant was identified as a participant in a separate incident. Although defendant was convicted in the separate incident, the jury was unaware of this fact. The victim's statement that defendant had been "locked up for a while" did not impute that defendant had been incarcerated subject to a separate offense, but raised the logical inference that defendant was in custody until his trial on the instant offense. In the absence of any indication that these unpreserved allegations of error deprived defendant of a fair trial, we decline to review them further. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

B

Defendant also avers that the police officer in charge of the case improperly responded, to the inquiry about how defendant was charged in this case, that "[h]e was in a line-up on another case." Defense counsel did object promptly to this testimony and therefore preserved this argument for our review. MRE 103(a)(1); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999).

While defendant maintained that the officer's reference to defendant's involvement in another case violated the court's pretrial order, we agree with and adopt the following astute observations of the trial court:

> The question of how Mr. Glenn became charged here posed by Mr. Welton [defense counsel] clearly invited this officer to make reference to the circumstances under which the finger of suspicion pointed to Mr. Glenn in this case. It could have been no other answer other than the one the officer gave. And, indeed, the officer gave one that was narrower. He didn't talk about the history. All he said was that he was in a line-up in another case. We don't know how that line-up came out. We don't know how that case came out. At least, the jury doesn't.
>
> And there has been no harm here. But, indeed, there has been no foul either, Mr. Welton, because your question invited that answer. I was startled, if anybody was startled in this case when you asked it. And I think you got the answer you sought. You opened up the door.

Even were we to accept defendant's characterization of the officer's statement as violative of the pretrial order, defendant's invitation of the officer's response waives our consideration of any alleged error in this respect. *Griffin*, *supra* at 46 ("[E]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence.").

C

Defendant additionally argues that the prosecutor's rebuttal witnesses improperly implied that defendant was involved in another criminal incident. Throughout trial, defense counsel repeatedly implied that defendant limped noticeably due to the amputation of the toes on his left foot, and thus could not have been the suspect described by the victim, who recalled that his attacker walked normally. Defendant's mother also testified that defendant limps and cannot run, and defendant showed the jury his toeless foot. In rebuttal, the prosecutor called three individuals who witnessed defendant rob a different cab driver. A brother and sister testified to witnessing an "event." The sister gave a detective a description of an involved individual and shortly thereafter identified the individual in the back seat of a car. The brother tried to chase the individual involved in the event, but the individual ran away too fast for the brother to catch him. The detective testified that he went to the event's location and that the involved individual the siblings identified was defendant.

"[T]he test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant." *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). In this case, the prosecutor properly offered rebuttal testimony that contradicted defendant's theory that eyewitnesses to the instant victim's attack, who did not observe the attacker limping, had misidentified defendant. *People v Rice (On Remand)*, 235 Mich App 429, 442; 597 NW2d 843 (1999). Moreover, a review of the rebuttal witnesses' cryptic testimony reveals that the prosecutor carefully questioned them to prevent the disclosure of any details concerning defendant's involvement in a similar crime. We conclude that the trial court did not abuse its discretion in admitting the testimony of the prosecutor's rebuttal witnesses. *Figgures*, *supra* at 398.

Because we find that the prosecutor did not introduce evidence of defendant's other criminal acts or convictions, we need not address defendant's argument on appeal concerning MRE 404(b).

II

Defendant next claims that he was denied the effective assistance of counsel. In the absence of a defendant's motion for new trial or evidentiary hearing before the trial court, this Court's review of alleged ineffective assistance is limited to the evidence available from the existing record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985).

Defendant first asserts that his attorney rendered ineffective assistance in failing to object to the admission of the rebuttal witnesses' testimony. Because the complained of evidence was properly admitted, however, defense counsel was not required to offer a meritless objection. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995). To the extent that defendant suggests that defense counsel was ineffective in opening the door to the rebuttal testimony, defense counsel's attempt to undermine eyewitness descriptions of the attacker with information concerning defendant's limp represents a matter of trial strategy, which we will not second guess on appeal. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Even assuming arguendo that defense counsel unreasonably failed to object to some and invited other testimony regarding defendant's incarceration and unrelated offenses, and that defense counsel

unreasonably failed to interview or demand the presence of a potential witness, we cannot conclude that this conduct affected the outcome of the case or otherwise deprived defendant of a fair trial. *People v Pickens*, 446 Mich 298, 303, 312; 521 NW2d 797 (1994). As we already have indicated, the various statements challenged by defendant did not add up to improper evidence of defendant's other bad acts. Furthermore, defendant failed to demonstrate that the witness defense counsel failed to interview would have offered any testimony that might have altered the outcome of his trial.

III

Defendant next contends that the trial court's blanket refusal to give the deliberating jury requested transcripts constituted error. We review for an abuse of discretion the trial court's decision whether to provide a deliberating jury with requested transcripts of trial testimony. *People v Howe*, 392 Mich 670, 675; 221 NW2d 350 (1974).

Thirty minutes after the jury retired to deliberate, it communicated to the trial court requests for (1) "all of the exhibits used at trial, except for the T-shirt," (2) the preliminary examination transcript, and (3) "a transcript of this trial." We note initially that the court properly denied the jury the preliminary examination transcript because "[a] trial court is not to provide the jury with unadmitted evidence." *People v Davis*, 216 Mich App 47, 57; 549 NW2d 1 (1996).

Although defendant correctly observes that the trial court neglected to express to the jury the possibility of future review of desired testimony and instead seemed to foreclose such a possibility, the jury's immediate demand for transcripts covering four days of witness testimony appears unreasonable. The jury's request for nearly all of the trial evidence and the trial transcript so shortly after retiring to deliberate seems not a request based on jury confusion with respect to a particular witness' testimony, but rather an attempt to assemble all available information to assist in the jury's deliberations. Within this record, no indication exists that the jury requested only a specific witness' testimony or that the jury sought clarification with respect to a limited, particular area of contention or confusion. Absent a more narrow inquiry from the jury, we cannot conclude that the trial court abused its discretion in denying the jury's unreasonable request. MCR 6.414(H) ("[T]he court must exercise its discretion to ensure fairness and to refuse unreasonable requests."); *Howe*, *supra* at 676-677.

IV

Lastly, defendant raises several challenges to the trial court's imposition of an enhanced (second offense) life sentence. We review the trial court's imposition of sentence for an abuse of discretion, which occurs when the sentence imposed is disproportionate to the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

Defendant contends that he was improperly sentenced as an habitual offender on the basis of a 1996 crime and its subsequent conviction, which occurred after the instant offense that defendant committed in 1995. We agree with defendant that the trial court's enhancement of defendant's instant conviction for the crime he committed in June 1995 on the basis of his conviction for a crime that occurred subsequent (September 1996) to the instant offense was improper.[1]

We note, however, that the felony information reflects that the prosecutor based the habitual offender second charge on the existence of defendant's May 1987 armed robbery conviction. The presentence report shows that in May 1987 defendant pleaded guilty of an armed robbery that had occurred in Livonia, for which he received a sentence of three to fifteen years' imprisonment. Because (1) the presentence report established defendant's prior conviction on which the prosecutor relied in charging defendant as an habitual offender, MCL 769.13(5)(c); MSA 28.1085(5)(c) ("The existence of a prior conviction may be established by any evidence that is relevant for that purpose, including . . . [i]nformation contained in a presentence report."), (2) defendant's sentence otherwise was based on accurate information, and (3) defendant had notice of the prior conviction the prosecutor intended to utilize and was afforded the opportunity at sentencing to raise any objections to the information contained within the presentence report, but conceded the correction of this information, we find no due process violation in the trial court's imposition of sentence as a second habitual offender. *People v Zinn*, 217 Mich App 340, 344-347; 551 NW2d 704 (1996); *People v Williams*, 215 Mich App 234, 236; 544 NW2d 480 (1996). Although the trial court noted on the record an incorrect prior conviction as the basis for enhancement of defendant's sentence, we find no error requiring reversal in this case where the unchallenged record establishes the propriety of defendant's sentence as a second habitual offender. Because defendant has presented no indication that his sentence as a second habitual offender was invalid, *People v Thenghkam*, ___ Mich App ___; ___ NW2d ___ (2000), slip op at 19, "[t]o remand this matter would be a waste of resources." *People v Beneson*, 192 Mich App 469, 471; 481 NW2d 799 (1992).

Defendant next argues that the trial court improperly sentenced him on the basis of a murder conviction when defendant was convicted of assault with intent to murder. Our review of the sentencing transcript reveals no indication that the trial court improperly or mistakenly sentenced defendant for a murder conviction. In response to defendant's request at the sentencing hearing that the court demonstrate mercy when fashioning a sentence, the trial court responded as follows:

> You have been convicted of a crime of enormous brutality. You ask mercy from the Court. . . . But no mercy was shown in [the victim]'s stabbing. There was brutality beyond any need. [The victim] survives to this day through a combination of divine intervention and the skill of some surgeons, but you could have just as easily been here on a murder charge had those events [not] intervened.
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> As far as the Court is concerned, what you have done and what your actions call for the Court to make no distinction between this conviction of assault with intent to murder, and murder, which might have come about had medical efforts not been successful.

The court's statements represent its emphasis on the brutality of defendant's crime and the grave nature of the injuries defendant inflicted. Immediately after these statements, however, the court twice reaffirmed that defendant had been convicted of assault with intent to murder, then proceeded to impose sentence. Because the sentence fell within the legislatively prescribed limits of punishment for assault with intent to murder, MCL 750.83; MSA 28.278, second offense, MCL 769.10; MSA 28.1082, we find no error as alleged by defendant.

Finally, defendant asserts that the trial court imposed a disproportionate sentence. In support of this contention, defendant cites plea negotiations before trial, in which the court urged the prosecutor to offer defendant a minimum sentence of twelve years in prison in exchange for defendant's guilty plea. Defendant theorizes that the trial court's imposition of a life sentence reflects that the court impermissibly punished defendant for exercising his right to a jury trial. Defendant further notes that all parties agreed that the pertinent guidelines range was five to twenty-five years.[2]

The trial court's suggestion during plea negotiations of a twelve-year minimum sentence is irrelevant to the court's post trial imposition of sentence. *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993) ("The judge's preliminary evaluation of the case does not bind the judge's sentencing discretion, since additional facts may emerge during later proceedings[or] in the presentence report."). Moreover, in light of the brutal nature of defendant's crime, which involved defendant's slashing of the victim's throat and subsequent, repeated stabbing of the back of the victim's neck, defendant's criminal background, and the propriety of the trial court's stated objective to protect society from defendant's criminal conduct, we reject defendant's contention that he received a disproportionate sentence. *Milbourn*, *supra*; *Rice*, *supra* at 446.

Affirmed.

/s/ Harold Hood
/s/ Hilda R. Gage
/s/ William C. Whitbeck

[1] The statute authorizing punishment as a second habitual offender states that if an individual who possesses one felony conviction commits a *subsequent* felony, "the person shall be punished upon conviction of the *subsequent* felony and sentencing" to an enhanced term of imprisonment as a second habitual offender. MCL 769.10(1); MSA 28.1082(1) (emphasis added). The Legislature provided increasing punishment for repeat offenders to deter individuals' commissions of repeated criminal acts and to provide more severe punishment for those persons who decline to change their ways following an opportunity to reform. *People v Stewart*, 441 Mich 89, 93; 490 NW2d 327 (1992). Here, defendant had not been convicted of the 1996 crime at the time he committed the instant crime in 1995, and thus was not afforded "an opportunity to reform" after conviction for the 1996 crime and before committing the instant crime in 1995. *Id*.

[2] We clarify that the applicable guidelines prepared after trial reflect a minimum term between fifteen and twenty-five years, or life. We do not consider the sentencing guidelines in determining the proportionality of defendant's sentence, however, because the guidelines do not apply to defendants sentenced as habitual offenders. *Rice*, *supra* at 447.